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ABSTRACT

The affirmative action concept developed out of case law as the courts decided passive attempts at desegregating schools failed to achieve results and out of civil rights legislation as administrative agencies adopted the court-established standards. A major challenge of affirmative action plans is to prevent court-approved goals from becoming unapproved quotas. Successful drafting of affirmative action plans for school districts involves stating the goal to be achieved and the time frame for achievement; listing the steps to be taken to achieve the goal; and clarifying the previous statements by noting exceptions, eliminating ambiguities, and specifying actions that the district is not obligated to take under the plan. An example of a plan is included. (Author/PGD)

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"AN AFFIRMATIVE ACTION PLAN RESPONSE TO OFFICE OF CIVIL RIGHTS ENFORCEMENT ACTION"

"UNDERSTANDING OFFICE OF CIVIL RIGHTS (OCR) ENFORCEMENT"
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AN AFFIRMATIVE ACTION PLAN RESPONSE TO OFFICE OF CIVIL RIGHTS ENFORCEMENT ACTION

Once a school district is confronted with or becomes involved in Office of Civil Rights (OCR) enforcement action, it may choose for reasons of necessity or expedience to resolve the matters in dispute through a negotiated settlement with OCR. In such event, the school district will in all probability be required by OCR to prepare and implement an affirmative action plan. This presentation is designed to give you some understanding of the nature and purpose of an affirmative action plan and to make some suggestions as to the manner in which one is prepared.

Basic to an understanding of an affirmative action plan is the concept of "affirmative action" and the development of this concept.

> One of the major sources of confusion in defining "affirmative action" is the fact that the concept arose from two somewhat separate legal roots. The first was the case law on racially segregated public schools, proceeding from the Brown decision in 1954. The second root was legislative, focusing primarily on employment discrimination, and beginning with the Civil Rights Act of 1964.
>
> Turning first to the education cases, it is important to note that all that were initiated prior to 1964 were necessarily based upon constitutional grounds, and because of the precedents already established, this often continued to be the case after 1964. Basically, the theory underlying the early cases was that the intentional establishment or maintenance of racially separate school systems was in violation of the equal protection clause of the Fourteenth Amendment to the Constitution. The remedy prescribed was, of course, desegregation, but twenty years later all of the questions that can be raised as to how that objective is to be achieved have not been answered. The problem is, of course, that simple agreement that the Fourteenth Amendment clearly forbids racially segregated schools does not mean that the efforts required to correct

the violation are equally clear. Defining these procedures must, therefore, be done by the courts, the Congress or the state legislatures.

In the early years following Brown, a number of systems were tried, but when they failed to produce substantial desegregation, the courts found them legally inadequate. This was the case with "freedom of choice" plans as dealt with in the Green case in which the Court found the school board in violation of the law because it failed to go far enough in dismantling its racially-separate dual system. In making the board's duty clear, the Court said:

> Schools officially are clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system.

Meeting this affirmative duty was quickly recognized as requiring the initiation of equally affirmative actions to effect desegregation.

The third and logically inevitable step in the school cases has been the ordering of particular means that are acceptable in achieving desegregation. Even where this step has been resisted out of the historic judicial reluctance of courts to assume what they regard as an administrative role, they have felt obligated to establish standards by which desegregation efforts could be evaluated. In most cases as in Green, the standard was whether or not desegregation, in fact, resulted.

When Congress enacted the nondiscrimination acts of the 1960s the precedents established in the school desegregation cases stood freshly at hand, and the administrative agencies charged with enforcement of the law moved quickly to adopt the standards developed in those cases.

Like the Court's original holdings in the school cases, the acts themselves contain no affirmative action provisions, but again the logic implicit in the law dictated the development of such provisions, primarily in the regulations of

the Equal Employment Opportunities Commission (EEOC), the Office for Civil Rights of the Department of Health, Education, and Welfare (OCR), and other federal departments and agencies in whom enforcement of the law is vested. Only in the Executive Orders 11246 (amended by 11375), which prohibits employment discrimination by federal contractors, is affirmative action specifically required without regard to a finding of discrimination.

The usual approach to evaluating a charge of discrimination was to look at the numbers of persons involved by race, and their relative situations. Disparity in the figures could be regarded as prima facie evidence of discrimination, requiring remedial action to correct the imbalance. The criterion for evaluating these actions was their numerical result, and to enable the institution to know when it had met the criterion, numerical goals were often established. All of these steps seemed logical until it was pointed out that numerical goals operating as decisional criteria for determining compliance with the law were very difficult to distinguish from quotas--which had often been declared to be themselves discriminatory, and therefore not permissible.

The courts have tried valiantly to distinguish goals from quotas, however, and many believe the distinction is clear:

If a numerical target serves only as an objective, it is clearly nondiscriminatory and is an appropriate form of affirmative action. If the target is to function in a legal and approvable manner, failure to hit the target cannot automatically be taken as proof of discrimination.

If, however, the numerical goal becomes a required objective, it becomes a quota. It is objectionable because it can only be attained by excluding some people in order to select or except others. In short, a quota is part of a system of preferential selection, which is reverse discrimination.

> Despite the apparent simplicity of distinguishing these terms, confusion continues in practice for the simple reason that those seeking to eliminate discrimination continually push to transform goals into quotas. This was recently acknowledged by no less an authority than the Attorney General of the United States who reportedly said that the government's affirmative action requirements for federal contractors involve hiring quotas instead of mere goals. He went on to say that he had no quarrel with this policy, that things should be called what they are.
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> Gluckman, Affirmative Action: Is It Really Discrimination in Reverse, 6 NOLPE School Law Journal 155 (1976).

When I am called upon to draft an affirmative action plan on behalf of a client school district, I normally begin this task by dividing the plan into three segments. The first segment is the goal of the plan. Here, I will state the overall result, the goal, which the school district will attempt to achieve by the plan and a projected time frame within which the school district will attempt to achieve same. This is the heart of the plan and the item in which OCR will have the most interest. The second segment is the steps to be taken. Here, I will state the specific steps to be taken by the school district to achieve the goal of the plan. This will usually include specific action to be taken by specific people or a class of people. Additionally, it may include criteria to be employed by such people in taking such action. The third and final segment is clarification of previous statements. This is sort of a catch-all where I will endeavor to eliminate any ambiguities which might exist in what I have already stated. I frequently state at this point specific examples of things which I understand the school district is not obliged to do under the plan.

To illustrate what I have just covered in a rather general way, let me tell you about an actual plan I have used.

A year or so ago, OCR instituted enforcement action against one of my client school districts claiming the district was in violation of Title VI of the Civil Rights Act of 1964 in that it allegedly employed its professional staff in a racially discriminatory manner. OCR sought across the board federal funds cut-off in the district. At the time this action was instituted, the school district operated a unitary, racially integrated school system with a

professional staff ratio of 90% White, 10% Black. Several years earlier, the district had operated a dual, racially segregated school system with a professional staff ratio of 70% White, 30% Black immediately prior to desegregation. OCR took the position that the district was employing its professional staff in a racially discriminatory manner because it had 20% fewer Black staff in its employ than immediately prior to desegregation.

My initial response to this OCR action was to strongly question OCR's ability to sustain its case solely on the basis of the ratio approach it was taking and also to challenge OCR's jurisdiction to involve itself in the district's employment practices under Title VI. However, after discussing the matter with the directors of the district and taking into account the economics and risks of litigation, it was decided to enter into settlement negotiations with OCR. The result of the settlement negotiations was the following OCR mandated and approved affirmative action plan:

> Goal of the Plan. To restore on or before the conclusion of school year 1976-1977 the minority-majority group professional staff ratio which existed in the District immediately prior to the District's desegregation in school year 1965-1966. (In the context of this particular plan, the District was to have one year to achieve its goal.)
>
> Specific steps to be taken by the District to achieve the goal of the Plan.
>
> (1) Utilizing the professional staff of the District, including minority group members of the staff, conduct on-site recruiting activities at colleges and universities in the area having a substantial minority group enrollment. Where such activities reveal employment interest on the part of qualified, minority group persons, take appropriate follow-up action with respect to such persons. Make periodic effectiveness evaluations of such activities and where shortcomings in the conduct of such activities are apparent, attempt to correct such shortcomings.
>
> (2) Contact organized minority groups in the School District community and request the assistance of such groups in locating and encouraging qualified minority group persons to seek employment on the District's professional staff.

(3) Request the assistance of minority group members of the District's professional staff in locating and encouraging qualified minority group persons to seek employment on the District's professional staff. This will be in addition to participating in the on-site, organized recruiting activities mentioned above and will contemplate individual, judgmental action on the part of minority group persons of the District's professional staff.

Objective, nonracial criteria to be utilized by the District in professional staff employment.

(1) Nondiscretionary criteria as set by the laws of the State of Arkansas and directives of the Arkansas Department of Education. This would include such things as Arkansas Department of Education certification requirements.

(2) Academic record.

(3) Experience both in general and in particular in area where employment sought.

(4) Age. Some positions in the District involve more physical strain than other positions and with respect to those positions involving physical strain younger persons are normally preferred.

(5) Past employment history including recommendations of previous employers on satisfactory job performance and in the case of teacher applicants having had no previous permanent job, the recommendations of appropriate administrative personnel concerning applicant's practice teaching experience.

(6) Condition of health, both mental and physical.

(7) Ability to communicate and proper use of language.

(8) Appearance, i.e., neat or slovenly.

Apart from item (1), this numerical listing of criteria is not intended to reflect any order of importance; indeed, all of the listed criteria are to be considered as a whole without any one criteria being singled out for special emphasis over the others.

In implementing the Plan set forth in this letter, the District will document its efforts in this regard and will be prepared to submit to your Agency upon request such documentation as evidence of the District's good faith in implementing the Plan.

In order to avoid any possible misunderstanding as to the scope of the Plan, you should be advised that the District submits the Plan to you with the following understandings:

(1) While the Plan is submitted with the intention of covering all professional staff employment in the District (administrators being classified as professional staff for the purpose of the Plan), all professional staff employment will, in turn, depend on vacancies occurring in the District.

(2) The District guarantees only that it will take the three specific steps of the Plan outlined above and that such steps will be taken in a positive, good faith manner. The District does not guarantee that it will achieve the goal of the Plan.

(3) That the Plan will in no way obligate the District to implement any sort of "racial quota" employment practice with respect to the employment of its professional staff.

(4) That the Plan will in no way obligate the District to employ any person who on the basis of the objective, nonracial criteria set forth above is not deemed qualified to perform the job for which a person is to be employed and further, given a choice of applicants for a particular professional staff position, the District will always employ the applicant who on the basis of such objective, nonracial criteria is the best qualified for the position.

Although the school district committed itself in the plan to the goal of restoring the predesegregation professional staff ratio, you will note that the only thing which it unconditionally obligated itself to do was to take the specific steps and employ the criteria set forth in the plan. It did not unconditionally obligate itself to achieve the goal of the plan, it specifically rejected the idea of ratio or quota hiring and it reserved for itself the right always to employ the most qualified individual without regard to race. As a postscript, I might add that in practice the plan did not prove unduly burdensome to implement. I should also add that although a good faith effort was made, the goal of the plan was not achieved.

In my part of the country, OCR continues to involve itself in school district employment practices under Title VI. Although this seems to me to be properly the function of the Equal Employment Opportunity Commission under Title VII of the Civil Rights Act of 1964, it probably makes little practical difference in terms of the use of affirmative action plans. The Equal Employment Opportunity Commission utilizes such plans to the same extent as OCR and what works for one should work for both. Of late, OCR has become increasingly active in the areas of Title IX sex discrimination and education and employment of the handicapped under Section 504 of the Rehabilitation Act of 1973. Like Title VI, I assume OCR will develop a taste for affirmative action plans in these areas as well. I do hope I am not called upon to draft any plans in these areas until the courts have had an opportunity to moderate applicable Department of Health, Education and Welfare regulations. Because of the harshness of these regulations and the heavy economic impact they will have on school districts, particularly in the area of education and employment of the handicapped, I am not at all certain that I could draft plans in these areas which would be acceptable to OCR and at the same time be reasonably possible of implementation by a school district. In any event, if called upon, I will attempt to do so and will likely use the same affirmative action plan format as discussed with you in this presentation.